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No. 95-664

In The
Supreme Court of the United States
October Term, 1995

COUNTY OF CONTRA COSTA,
Petitioner,

v.

DALE H. VISNESS,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

STATEMENT OF *AMICUS CURIAE* STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 37.5 and 37.6 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Montana files a Statement as *amicus curiae* and requests the Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed on June 12, 1995.

STATEMENT OF *AMICUS CURIAE*

The Attorney General of the State of Montana joins in the argument of the District Attorney of the City and County of San Francisco and, for the reasons stated in his *amicus curiae* brief, urges the Court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit filed in this matter.

Respectfully submitted,

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Bankruptcy Code exempts from discharge a debt to a spouse or child for support that is "in connection with" an agreement or court order. 11 U.S.C. § 523(a)(5). When "such debts" are assigned to a county on receipt of AFDC, they are not exempt, unless the debts reflect rights "which have accrued at the time such assignment is executed," 42 U.S.C. §§ 602(a)(26), 656(b).

In California, even where no support obligation was established in connection with an agreement or order at the time of the assignment, and even though a county delays for three additional years before bringing an action to establish the support obligation, the county has a unique statutory cause of action for reimbursement that is retroactive to benefits paid while the county was delaying.

In this context, the petition for certiorari raises the following questions:

1. Did the appellate court correctly hold that the retroactive debt to the county is dischargeable under the plain meaning of the statutes?

2. When a county's delay in establishing a support obligation causes a multi-year retroactive judgment instead of current monthly payments, is the retroactive debt exempt from bankruptcy discharge?

3. Is review merited where the Court denied certiorari on the same issue nine years ago, and the petition asserts no further conflict?

4. Is certiorari appropriate where the petition depends upon a claim that a California appellate decision on state family law issues law is "wrong"?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent Dale H. Visness respectfully submits this brief in opposition to the County of Contra Costa's petition for certiorari. Respondent requests that the Court deny the petition or, alternatively, clarify the federal principles and affirm that the retroactive debt is dischargeable in bankruptcy.

INTRODUCTION AND SUMMARY

Contra Costa County's petition for certiorari resurrects a narrow question of bankruptcy law for which this Court denied certiorari nine years ago. *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), *cert. denied*, 481 U.S. 1003 (1987). The supposed "conflict" among circuits was illusory in 1986; and the county asserts no new or greater conflict today.

The Ninth Circuit's decision is correct as a matter of statutory interpretation, public policy and equity.

Under 11 U.S.C. § 523(a)(5), a debt to a spouse or child for support that is "in connection with" an agreement or order is exempt from discharge. When "such debts" are assigned upon receipt of Aid to Families with Dependent Children ("AFDC"), there is no exemption unless the assignment was pursuant to the Social Security Act. Such assignments, in turn, are limited to "rights to support ... which have accrued at the time such assignment is executed ...." 42 U.S.C. §§ 602(a)(26), 656(b).

Immediately upon receiving assignments of support rights in 1983 and 1985, the county had a unique statutory cause of action to establish Mr. Visness' support obligation. Cal. Welf. & Inst. Code § 11350. Prompt action would have resulted in a prospective order for manageable monthly payments. Instead, the county delayed.

With the three-year statute of limitations expiring, the county finally asserted its rights in 1987. But in addition

to the current payments, the county obtained a *retroactive* judgment for three years of benefits paid during the time that it had been sitting on its rights.

The Court of Appeals correctly held that the county's retroactive judgment is not within the plain literal terms of the bankruptcy discharge exemption. Clearly, the pre-1987 sums were not assigned debts for support "in connection with" an agreement or court order; and no such support rights had "accrued" at the time the assignment was executed.

The decision correctly addresses California family law within the framework of the Bankruptcy Code. When a spouse or child fails to establish a support obligation by agreement or court order, no right to retroactive support accrues under California law. As assignee of the Visness' support rights, the county has no greater claim to exemption under the Bankruptcy Code.

The county's retroactive judgment therefore is a creature of the unique statutory cause of action; it is not derived from assignment of any accrued right to support in connection with an agreement or court order. The retroactive judgment therefore is subject to the general bankruptcy policy of providing a "fresh start" -- not an exception that Congress has carefully and narrowly crafted.

Nor do public policies or equities support a departure from the statutory language. The county created its own difficulty by waiting until the limitations period was

expiring. Had it diligently established the support obligation, Mr. Visness could have made realistic monthly payments, rather than being overwhelmed by three years of retroactive debt.

Having effectively caused the bankruptcy, the county is in a poor equitable position to complain of the discharge.

The county seeks to avoid the plain meaning of the Bankruptcy Code by urging a strained reading of California family law. But the end-run fails because the state courts themselves have rejected that position.

At bottom, the California Attorney General argues to this Court that a California appellate decision on California family law, which the California Supreme Court declined to review, and in which the California Attorney General's own team of specialists was opposed only by a father appearing *in propria persona*, is "wrong law."

Respondent respectfully submits that certiorari should be denied. Alternatively, the Court may provide further guidance while affirming the principle that such retroactive debts are dischargeable in bankruptcy.

STATEMENT OF THE CASE

The county's statement of the case omits significant information and makes incorrect or misleading assertions.

First, it begins with a truncated view of 11 United States Code § 523(a)(5). Pet. at 3. The section does exempt from discharge a debt "to a spouse, former spouse, or child of

the debtor, for ... support" -- but only when that support is "*in connection with" an agreement or court order*. App. at 61.

The omitted qualification is significant to this case: no debt was or is owed to the spouse or child for support in connection with any agreement or court order.[1]

Second, the petition correctly states that AFDC recipients must assign accrued support rights to the county under 42 United States Code § 602(a)(26), i.e., § 402(a)(26) of the Social Security Act; and California Welfare & Institutions Code § 11350 gives the county a cause of action for reimbursement of AFDC benefits during separation. Pet. at 3.

But the county omits the related California law that refutes its position that this retroactive debt is among the assigned rights. As the Court of Appeals observed, a state appellate court has "refused to characterize a judgment obtained pursuant to ... § 11350 as an adjudication of a support obligation owed ... to the custodial parent or child." App. at 34, *In re Visness*, 57 F.3d 775, 779 (9th Cir. 1995). Instead,

> without a preexisting court decree establishing the non-custodial parent's support duty, there is no outstanding right to reimbursement for child

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[1] The county also cites § 523(a)(5)(B) for a broad assertion that "obligations in the nature of support are not dischargeable." Pet. at 21-23. The reference to "nature of support" merely qualifies the debts for support "in connection with" an agreement or order, which are the only debts within 523(a)(5). In other words, subsection (a)(5)(B) does not create a new or different class of exempt obligations.

> support. Accordingly, the [state] court determined that a judgment against a parent for reimbursement of AFDC benefits under section 11350 "enforces a duty to repay a statutorily created debt, not a duty owed to the spouse or child."

Id., quoting *Crider v. Superior Court*, 15 Cal.App.4th 227, 232-234 & n. 5, 18 Cal.Rptr. 757 (1993), *review denied, Cal. Sup. Ct.* (1993).

The Court of Appeal also quotes *In re Marriage of Goosmann*, 26 Cal.App.4th 838, 844, 31 Cal.Rptr. 613 (1994), which reiterates the "long-standing" rule that "'an order for child support only operates prospectively'" and "'a parent cannot claim reimbursement for money paid out in support of a child prior to an order directing the other parent to pay support.'" App. at 34-35, *In re Visness*, 57 F.3d at 779.

The county's rights *as assignee*, moreover, are no greater than those of the assignor. *In re Marriage of Smith*, 209 Cal.App.3d 196, 203-204, 257 Cal.Rptr. 47 (1989).

Once again, these omissions are significant. The "support rights" that are assigned to the county are to establish a *prospective* obligation and to obtain payments or arrearages *commencing with an agreement or court order*.

As the Court of Appeals determined, then, the retroactive debt to the county was created only by California statute; it is *not* an accrued support debt that the spouse or children assigned to the county within the language of the exemption.

Third, the county states that California law defines "support" as including amounts owing under § 11350. Pet. at